

In The Supreme Court of Mississippi

COA

FILED

ORIGINAL

FEB 16 2016

CAUSE # 2015-CP-01301-

COA

Appellant's Brief

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

Pro'se

Comes now, Appellant Dexter Moore, Pro'se and through himself, respectfully moves this Court to consider this appeal from the denial of Post-Conviction Collateral Relief signed and ordered by sentencing Judge Honorable James Ritchens on the 7th day of August 2015. The sentencing Court held that Moore filed his motion past the statute of limitations provided in section 99-39-5-MCA (1972) which allows for a post conviction motion to be filed three years after conviction following a plea of guilty or three yrs, following ruling on direct appeal following trial. The court also stated that Moore's motion met none of the exceptions to section 99-39-5 MCA 1972. Defendant here would show unto the supreme court that he presented fundamental issues before the court, and therefore should never have been time barred by the lower, sentencing court.

Signed this 16th day of Feb 2016

Dexter Moore



Issue one:

Whether a claim of "illegal sentence" has been found to be fundamental and cannot be procedurally barred under a form post-conviction collateral relief act. (see Kennedy vs. state) 32 So. 2d. 184, 186 (Miss 1999) The right to be free from an illegal sentence has in fact been found to be fundamental.

Like a double Jeopardy claim, a claim of illegal sentence or denial of due process in sentencing also must be considered regardless of when it is raised, because the state is without authority or right to impose a sentence that is illegal. (Rowland vs. state) 98, 56 3d 1032, 1036 (96) Miss 2012) In an on Mark Dewayne Sumrell's application for leave to proceed in the trial court, where by he seeks permission to file a motion for post-conviction relief five yrs. later, The supreme COURT held that, "Although this court has directly considered this argument, sumrell's claim is not time barred by res judicata because one definitely has a fundamental right to be free from an illegal sentence. Sumrell v. state No. 2007-M-01971 rendered Oct. 3, 2013 (serial 186726) Rule (709) Rule 11.03 plainly states "that an indictment must" include certain habitual offender information in order for a sentence to be considered proper. This rule merely allows the state to comply with Rule 11.03. Hawthorne v. st. 751 So. 2d 1090, 1999 Miss App Lexis 457 Ct. App 1998. In Keys v. st. 549 So 2d. 949 (Miss. 1989) The court held that, although an accused has no constitutional right to a trial by jury on whether or not he or she is a habitual offender it is required that the accused be properly indicted as an habitual offender, that the prosecution prove the prior offenses by competent evidence, and that the defendant be given a reasonable opportunity to challenge the prosecution's proof.

here, the defendant is challenging an illegal sentence and not whether or not he's an habitual offender. Defendant (Dexter Moore) argues that his original indictment on its face did not charge Moore as an habitual offender, nor did the original indictment contain any habitual offender language, or notice that the court had intended to charge defendant as an habitual offender. (See original Indictment) In the defendant's post-conviction, Defendant argued this issue. The issue of a proper indictment is an issue that is concerning a violation of a fundamental right and therefore should not have been legally time barred. Moore, now moves to a well known case which was decided by the supreme court of MS.

Albert Joiner, Jr. vs. State of Mississippi. NO 2009-CT-00222-SCT | May 19, 2011. This case is in many ways equivalent to Moore's case, Joiner, like Moore was sentenced as an habitual offender. Although Joiner's indictment listed several prior felonies against Joiner, the indictment did not charge Joiner as an habitual offender. Like wise Moore's indictment did not charge him as an habitual offender. Joiner plead guilty to felony flight and strong armed robbery as a "lesser habitual offender" under Ms. Code Section 99-19-81, and was sentenced to 19 years as a sect. 99-19-81 habitual offender. Moore plead guilty to possession of Cocaine in the amount of 0.36 grams, less than a gram and was sentenced to 16 years mandatory as a habitual offender. The plea colloquy in Joiner's case revealed that Joiner was well aware that he was pleading as a habitual offender. Similarly Moore's plea colloquy also revealed that Moore was well aware that he was pleading to possession of Cocaine as a habitual offender. The court first found that Joiner knowingly and voluntarily pleaded guilty to the

charge of felony flight as a sect 99-19-81 hab. offender. The court further found that a knowing and voluntary guilty plea waives an indictment's failure to include habitual offender status. The court affirmed the trial court's denial of Joiner's petition for post-conviction relief as well as the CoA's Affirmance of that judgment. However, the Court's decision was overruled respectfully, by a panel of judges dissenting. This court stated that the majority's decision eliminates the requirement under uniform rule of Circuit and County Court Practice 7.09 that the state obtain an amendment to the indictment before a defendant may be sentenced as an habitual offender, depriving Joiner and future defendants of due process of law. An indictment against an habitual offender must include a charge of habitual offender ~~must~~ status sufficient to satisfy notice/due process requirements and double jeopardy concerns. Hentz v. state 542 So.2d 914, 918 (Miss 1989) This court has held that if a defendant is not indicted as a habitual offender, the defendant cannot be convicted and sentenced as a habitual offender. Fezzell v. state, 761 So.2d. 140, 142-43 (Miss 2000) In Joiner's case because the state failed to seek and obtain an amendment to Joiner's indictment under Rule 7.09, Joiner stood before the court, having been sentenced, but never indicted as a habitual offender. Therefore the court found that Joiner's guilty plea did not waive this error. Rule 7.09 clearly requires that an ~~amendment~~ indictment must be amended before the state may seek habitual-offender sentencing. The amendment must be made in such a time as to permit the defendant a fair opportunity to present a defense and to prevent unfair surprise. These are due process considerations, which cannot be procedurally time barred regardless of when the issue is raised.

Where a prisoner is proceeding pro se, a reviewing court takes that fact into account, and in its discretion, credits not so well pleaded allegations, so that a prisoner's meritorious complaint may not be lost because in artfully drafted. *Hannah v. State* (Miss 2006) 943.

Issue two:

Was Moore unfairly surprised by the state's untimely motion to amend Moore's indictment. The motion came on the day of sentencing. Moore had no knowledge of the state's intentions to charge him as an habitual offender, since Appellant's original indictment did not charge him as ~~an~~ ^{an} habitual offender. Rule 7.09 states: That the amendment of indictments shall be allowed "only" if the defendant is afforded a fair opportunity to present a defense and is not unfairly surprised. During Moore's sentencing phase, Moore was asked by the sentencing judge if he was satisfied with his counsel's performance. Although the defendant answered yes, he also advised the sentencing judge that the charge in which he was pleading as an habitual offender (possession of cocaine) he was not guilty of (see transcript p. 15 line 21) The judge asks the defendant Did you have the cocaine that was 0.36 grams less than a gram? The defendant answers NO. Defendant then was asked by the judge, Then why are you pleading guilty to something that you did^{n't} do? The defendant answers; Because he said (Defendant refers to atty.) it was a better deal than getting 30 years. Although the amendment of an indictment may be amended up sentencing, if a defendant shows through his actions or statements that he's unfairly surprised then the amendment should not be allowed. Even though Moore didn't object to the untimely amendment his actions and statements to the judge clearly indicates that he was very much surprised by the state's intentions to charge him as an habitual offender. The defendant advises the judge that he had only spoken with his court appointed attorney twice. A day before sentencing and the day of sentencing. (see Trans. p. 10 line 24)

Sentencing proceedings Moore wished to hire an attorney. Moore was showing acts of surprise by asking the judge if he could hire another attorney, because the defendant that he had not had enough time to consult with his attorney. Moore was not given a reasonable opportunity to challenge the prosecution's proof. Moore was first told by the sentencing judge that he couldn't hire his own attorney, even though this was Moore's first request for a continuance, denial of an accused's right to choose counsel of choice is clearly a fundamental violation (See trans p 12 Line 23) The sentencing judge refuses to allow defendant a choice as to who would represent him. Where right to counsel is conceded by statutory and constitutional provisions of state, accused should be afforded fair opportunity to secure counsel of his own choice (Code Ala. 1923) Proof of deprivation of one's right to counsel is complete when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of representation he received U.S. C. A. Const. Amend 6. Had Moore been given a fair opportunity to present a defense to his habitual offender status, he surely wouldn't have sought out to have his attorney removed. but since he was left no choice by the sentencing judge but to continue sentencing phase, the defendant couldn't, praise at the time, challenge the attorney named ~~ment~~ surely one would not be satisfied with attorney, but still seek to withdraw from his attorney. Moore argues that the issue of being unfairly surprised by the state's intention to indict him as a habitual offender, should not have been time barred because one has a fundamental right to be afforded due process, To be afforded a fair opportunity to present a defense to his alleged habitual offender status. Moore would show unto this court that he was indeed surprised by the state's intention to charge him as an habitual offender. And therefore Moore should not be

(Issue Three)

Moore was unconstitutionally deprived of the right to choose the counsel of his own choice. In *U.S. v. Caugheter* *Gonzalez-Lopez* the Supreme Court held that trial court's erroneous deprivation of defendant's Sixth Amendment right to choice of counsel entitled him to reversal of his conviction, as error qualified as a "structural error" not subject to review for harmlessness. Moore advised the sentencing judge that he wished to hire a lawyer. Although this was Moore's first request for a continuance in order to obtain new counsel, he was denied. (see transcript pg. 12 line 16-25.) Judge advises defendant that he will not allow a continuance, after defendant clearly request a continuance, and claims that he's not satisfied ~~with~~ with the representation of his counsel. (Stephen Franklin Reynolds, v. D.C., Florida, No. 115. The Supreme Co. Mr. Justice Black held, that the petitioner was entitled to a hearing in the Florida Supreme Court on his allegations that he had been deprived of due process because the criminal court refused to grant him a continuance to obtain the assistance of counsel. (where right to counsel is conceded by statutory and constitutional provisions of state, accused should be afforded fair opportunity to secure counsel of his own choice. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Denial of an accused right to secure counsel of his choice is a denial of due process in the constitutional sense. If a court shall deprive a person of the benefit of counsel it would not be due process of law. The right of a person accused of a crime to have counsel is perhaps the most important privilege the accused has. The failure of the trial court to give Moore reasonable time and opportunity to secure counsel was a clear denial of due process, and therefore should not have been considered time barred on post-conviction.

e in Moore's case the trial judge clearly deprived Moore of his
right to Counsel, one has a fundamental right to receive effective
assistance of Counsel. After showing dissatisfaction with his appointed
counsel's performance, Moore asked the trial judge if he could
be granted a continuance in order to obtain paid counsel, the trial
judge denied the defendant a continuance as well as his right to
Counsel. The trial Court committed plain error by denying the accused
Dexter Moore the opportunity to secure an attorney of his choice.
The right of an accused to assistance of Counsel includes right to
assistance of Counsel from time of arraignment until beginning of trial
for purpose of Consultation, investigation, and preparation for trial,
(Code Ala. 1923 § 5567 Const, Ala, 1901.) A defendant charged with a felony
and facing prison time that is a sentence that carries enhancement shall not
be stripped of his right to have sufficient time to consult with Counsel
and prepare his defense. The sixth Amendment guarantees the defendant
the right to be represented by an otherwise qualified attorney whom that
defendant can afford to hire, or who is willing to represent the defendant
even though he is without funds. U.S.C.A. Const. Amend 6, where the right to
be assisted by Counsel of one's choice is wrongfully denied, it is unnecessary
to conduct an ineffectiveness or prejudice inquiry to establish a 6th
Amendment violation, since the right to select Counsel of one's choice is not
derived from the 6th amendment's purpose of ensuring a fair trial; the
deprivation of this right is complete when the defendant is erroneously
prevented from being represented by the lawyer he wants, regardless of
the quality of the representation he received. The right to Counsel of
choice commands not that a trial be fair, but that a particular guaran-
tee of fairness be provided — to wit, that the accused be defended by the
Counsel he believes to be best. Cf. Crawford v. Washington, 541 U.S. 36, 61, 124 S.C.

Trial Court's erroneous deprivation of a criminal defendant's choice of counsel entitles him to reversal of his conviction or convictions. The sixth amendment provides that "[I]n all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense. The courts have previously held that an element of this right is the right of a defendant who does not require appointed counsel to choose who represents him. Moore clearly was deprived of the right to have counsel whom he felt would best represent him at his side. The right to counsel is critical in a sentencing phase and Moore was stripped of that right by the trial judge.

Issue four

Trial Court committed plain error by sentencing Moore as a habitual offender under 99-19-81 because the state failed to place certified copies of the defendant's prior convictions into the records or to offer any evidence to support his habitual offender status, other than a recitation of his prior convictions. (See trans. pg 21 lines 17-22) By the court: Also Mr. Jackson (Ass. Dist. Atty) do you have your copies of your two prior convictions for your habitual"? By Mr. Jackson (Assistant District Atty) we don't right now your honor, but we'll get them as soon as we finish up. At this point Moore's appointed lawyer speaks to the court. "Your honor we've... I've reviewed them I know. They're Oklahoma County Cause #, and. (See trans line 25-24) The state not only sentenced the defendant as a habitual offender without proof of prior convictions, but they also failed to even state the cause numbers of the prior convictions in open court.

(Issue five)

was Moore's plea ~~made~~ freely and voluntarily.

Moore argues that his plea was in fact not made freely and upon his own will. A defendant who is dissatisfied with appointed Counsel must show good cause to warrant substitution of Counsel, such as conflict of interest, irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant. In Moore's case he advises the sentencing judge that he had not had adequate time to consult with Counsel (See Trans. pg 16 line 24) the defendant advises the judge that he only spoke with his attorney on two occasions, ~~once~~ once a day before trial and once on the day of sentencing. The reasonableness of Counsel's actions may be determined or substantially influenced by defendant's own statements or actions. The sixth amendment guarantees more than a pro forma encounter between the accused and his counsel and approx. 16 minutes of consultation spread over two meetings does not satisfy the sixth amendment requirements. Defendant was asked by the judge on the facts of a possession of cocaine charge. By judge: is that what happen Mr. Moore? Defendant answers "NO sir," Not on the possession charge. Judge then ask defendant then why are you pleading guilty? Moore answers, "because my attorney told me it was a better deal than getting 30 years. (See Trans. pg 15 line 21) at this point the defendant asks judge if he could've hired a lawyer since his sister was financially able to do so at the time (See Trans. pg. 15 line 25-29.) The judge denied defendant the right to counsel. Moore also asked for a continuance since this was his first court appearance and also his first request for a continuance. He was denied. The defendant argues here that he plainly was duped into pleading guilty on the charge of possession .36 grams less than a 5 gram.

since v. state plain error was committed in defendant's enhanced sentencing as a habitual offender where the criminal history report in which the state relied on did not appear in the record, and where there were no certified ~~and~~ copies of any judgement of convictions which are the best evidence of a conviction. since v. st. 844 so 2d. 510 (Miss Ct. App 2003) as far as the indictment purported to charge defendant as a habitual offender was also deficient under Miss. unif. Cir and County Ct. practice Rule 11.03, as the indictment did not fully acquaint defendant with the nature of the accusations. An accused has a right to be properly indicted. In Ellis v. state a defendant was entitled to have his sentence as a habitual offender vacated, where the state, at trial proved that he had two prior felony convictions, but failed to prove that he had actually served one yr. or more on such convictions. In Moore's case the prosecution recited aloud that Moore was indeed a habitual offender, but failed to put on proof or present certified copies of Moore's prior convictions. Therefore Moore should not have been sentenced as a habitual offender. (Girayer vs. st) an intervening decision made by the court. Court committed plain error by not placing certified copies of defendant's prior convictions into the records to reflect his status as a habitual offender. Likewise in Moore's case the sentencing court also committed plain error by not placing certified copies of Moore's prior convictions into the record. recitation of Moore's prior convictions by the court was not enough evidence to charge defendant as a habitual. the court clearly erred.

Relief Sought

Moore (Defendant/Appellant) now moves respectfully, and asks that he be sentenced as a non-habitual offender, and or that his sentence as a enhanced habitual offender be vacated on the basis that the Defendant was not indicted as an habitual off. Yet he was sentenced as one. Moore asks that he be relieved from the imposition of a mandatory 16 yrs. Moore Ask that he be re-sentenced as a non-habitual offender.

Appellant's Brief

This The 16th day of Feb. 2016

Dexter Moore